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Supreme Court of the United States.

OCTOBER TERM, 1899.

NO. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in error,
vs.
THE CITY OF CHICAGO.

In error to the Supreme Court of Illinois.

BRIEF IN REPLY TO ARGUMENT ON BEHALF OF THE CITY OF CHICAGO.

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I.

As to the jurisdiction of this court.

A federal question is presented in this record because an attempt is made, by virtue of the act of April 10, 1872, under which the present city of Chicago was organized in 1875, and by virtue of certain recent ordinances, to impair and deny the contract rights of the Illinois Central Railroad Company, plaintiff in error, conferred by the charter of February 10, 1851. The submerged lands now in question were brought within the city limits or jurisdiction by the act of February 12, 1853, passed two years subsequent to the charter. The protection of the contract clause of the federal constitution was distinctly pleaded as the ground of action (record, p. 18), and the decision of the court below was in favor of the city's claim and necessarily gave effect to subsequent legislation and ordinances impairing the obligation of the contract contained in the charter.

The answer of the city of Chicago alleges as follows (record, p. 37, 40–41):

> "And this defendant further says that it is a municipal corporation, organized and subsisting under and by virtue of that

certain act of the General Assembly of the State of Illinois, entitled 'An act to provide for the incorporation of cities and villages (approved April 10, 1872, in force July 1, 1872),' and the several acts amendatory thereof and supplementary thereto, and that, among other things, it is empowered to regulate and control the use of public landing places for docks and levees; to control and regulate the anchorage, moorage and landing of all water crafts and their cargoes; to make regulations in regard to the use of harbors, and to appoint harbor masters and define their duties, and that in the exercise of such power this defendant has, through its police power, prevented the said complainant hitherto from filling up the said lake and intruding upon the navigable waters thereof. . . . . And that it is further made the duty of the city of Chicago, by its charter, to regulate the police of said city and pass and enforce all necessary police ordinances; that the city council of said city has made and established the following ordinances:

" '790. (Police powers.)—The harbor master and assistant harbor masters shall be sworn in as special policemen by the superintendent of police, for the purpose of carrying more readily into effect the police regulations of the city concerning the harbor under their charge, and to preserve the public peace and quiet in and about the harbor, and for such purposes shall have all the power and authority of police officers under the laws of the State and the ordinances of the city of Chicago.'

" '791. (Definitions.)—The harbor shall consist of the Chicago river and its branches to their respective sources, including that portion known as the Ogden canal, and all slips adjacent to and connecting with the Chicago river, the piers, and basins, including the waters of the Government breakwater which lie adjoining to, and extending three miles into the lake between the north and south lines of the city, and all the territory embraced between the limits of said survey as aforesaid shall be a portion of the harbor of the city of Chicago, and shall be subject to the control of the harbor master and to all the rules and regulations of this chapter, or which shall be hereafter provided by the city council. The words 'vessel,' 'crafts' and 'floats' shall be deemed to include every species of steam and other vessels lying or floating in or navigating the harbor.'

" '793. (Pile-driving—encroachment on harbor lines.)—No person or persons shall drive or place, or cause to be driven or placed any pile or piles, stone, timbers, earth or other obstruction in the harbor of the city without permission of the commissioner of public works, nor shall any person or company use

the piers of the harbors erected by the Government of the United States without the permission of the agent of the United States for said piers, or the harbor master. It shall be the duty of the harbor master to report to the city engineer any and all encroachments upon the harbor lines as now established, or which may hereafter be established, and thereupon they shall take such action as may be necessary to enforce the provisions of this chapter.'

"'795. (Penalties.)—Any person or persons violating any provision of either of the last two sections of this chapter shall, on conviction thereof, be fined not less than twenty-five dollars, nor more than fifty dollars for the first offense, and not more than seventy-five dollars for each and every subsequent offense.'

"And that said ordinances are in full force and effect, and that the said arrests complained of in the said bill of complaint was made on complaints respectively for a violation of said ordinances, or some of them, in the police courts of said city, and that this court has no jurisdiction covering the same, nor power or authority to prevent the enforcement of said ordinances."

The case is brought by these allegations strictly within the rule laid down in *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 266, where Mr. Justice Harlan said:

"We sustain the jurisdiction of the Circuit Court because it appears that the defendant grounded its right to enact the ordinance in question, and to maintain and erect gas-works of its own, upon that section of the Municipal Code of Ohio, adopted in 1869 (now section 2486 of the Revised Statutes), providing that the city council of any city or village should have power, whenever it was deemed expedient and for the public good, to erect gas-works at the expense of the corporation, or to purchase gas-works already erected therein; which section the plaintiff contends, if construed as conferring the authority claimed, impaired the obligation of its contract previously made with the State and the city."

So in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 10, Mr. Justice Brown said:

"We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and laws of the United States."

Illustrations of the application of the rule may also be found in *Weston and others* v. *The City Council of Charleston*, 2 Pet. 449, 463; *Home Ins. Co.* v. *City Council*, 93 U. S. 116, 121; *Williams* v. *Bruffy*, 96 U. S. 176, 183; *Murray* v. *Charleston*, 96 U. S. 432, 441; *New Orleans Water-Works Co.* v. *Rivers*, 115 U. S. 674, 681; *N. O. Waterworks* v. *La. Sugar Co.*, 125 U. S. 18, 31; *Bacon* v. *Texas*, 163 U. S. 207, 216; *Iron Mountain R. Co.* v. *City of Memphis*, 96 Fed. Rep. 113, 126 (1899).

Mr. Justice Brown, in the *Walla Walla* case, points out distinctly the difference between acts of a municipality "as the agent of the State for the preservation of peace and the protection of persons and property, and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business" (p. 8). This distinction operates in favor of the jurisdiction in the case at bar even more strongly than in the *Walla Walla* case, because in the latter case the city might well be considered as having made the contract in its proprietary capacity; whereas, in the case at bar, not only was the contract itself made between the state and the railroad company, but the ordinances of the city locating the track were passed in its capacity as "agent of the state," as we find repeatedly asserted in the defendant's brief now filed (pp. 23, 25, 27).

The defendant, notwithstanding the fact that this land at Twenty-seventh street was not within the city limits in 1851, and the explicit allegations in its answer grounding its right of interference with the railroad company upon the legislation of 1872 and the ordinances subsequently passed, and, notwithstanding that this was the point and defense litigated below, now seeks to change its position by claiming that it is not acting under any

legislation of 1872, but under the city charter in force in 1851. No reference, however, is contained in the record or even in the brief to the provisions of the charter in force in 1851; but the charter referred to must have been the act of February 14, 1851, four days *subsequent* to the charter (see appendix to this brief). This is the first time in the course of this litigation that any such claim has been advanced, or that any reference has been made to the charter of 1851, except that in its cross-bill (record, p. 42) the defendant alleged:

> "That heretofore, in the year 1851, your orator, The City of Chicago, then was a municipal corporation organized and acting under its special charter, under which it continued to exist and act until the year 1875, when it became incorporated under the general laws of said State."

With the exception of this reference the special charter does not appear, and there is nothing to enable the court to determine what its provisions were, or to show that they applied. But, clearly it was subsequent legislation which brought this land within the city's jurisdiction to consent to any location of railroad tracks. Whatever pre-emptive right existed in favor of the railroad company by virtue of the location in 1852 must be deemed to have been preserved unimpaired when the subsequent legislation extended the city limits so as to include the track at Twenty-seventh street. There is no suggestion that the ordinances relied on by the defendant and pleaded in its answer were in force in 1851, and in fact such is not the case.[1] It is, moreover, significant that reference is made in other portions of the defendant's brief (*e.g.*, p. 13) to the legislation of 1863, to the laws and ordinances of 1866, and to the revision of 1896, as support-

[1] Section 790 of the present ordinances was adopted April 8, 1897, and sections 791, 793 and 795 were adopted June 26, 1890. None of these four sections was in force prior to 1890.

ing the city's action, all subsequent to the act of 1851 incorporating the Illinois Central Railroad Company.

But even granting, only for the argument's sake, that in 1851, prior to the railroad company's charter, the city of Chicago was vested with power to regulate the lake front within or without the city limits as then existing to the extent now asserted, it is clear that any such authority must have been subject to the power of the legislature to grant the lands under water owned by the state, and that, if the grant to the Illinois Central Railroad Company means what the plaintiff in error contends, the prior authority or agency of the city, even if it existed, became inoperative, and was repealed or limited by the grant contained in the company's charter. It has never been suggested that the legislature could not grant the submerged land at Twenty-seventh street now in question without the city's consent, for the land was not then within the city limits, nor is it claimed that the city had any estate therein as riparian owner or otherwise. If any authority existing prior to February 10, 1851, was reinvested in the city or extended by the legislation of February 14, 1851, or that of 1853 and 1863, or by the municipal charter of 1875, or the ordinances of 1866, 1890 and 1897, this is obviously subsequent legislation, although it may be a mere re-enactment of what existed in 1851, or, in other words, a re-enforcement of the original authority. A similar point was urged in *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184, but Mr. Chief Justice Fuller said:

> "The result is the same, although the act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes, for if the contract existed those laws became inoperative, and would be reinstated by the act of 1888. The motion to dismiss the writ of error is therefore overruled."

It is, therefore, submitted that neither the contention that the city is acting by virtue of some legislation in force in 1851, nor the contention that the present legislation is similar to that in force in 1851, advances or strengthens the position of the city; and that the case must be considered upon the merits because properly presenting the controlling federal question of impairment of a contract by subsequent legislation.

II.

As to the requirement of the city's consent.

The brief now filed on behalf of the city of Chicago makes a point which was not anticipated or discussed in the arguments heretofore filed on behalf of the plaintiff in error, because it is now first made in this litigation. The point is that, whatever may be the scope of the grant to the Illinois Central Railroad Company by its charter of "all such lands, waters, materials and privileges belonging to the state," the act imposed the condition that the railroad company should not at any time take any state lands or waters within the limits of any city without the consent of its common council. The charter certainly does not so provide. Moreover, the lands in question were not within the city when the road was located, and the subsequent expansion of the city by the statute of 1853 could not impair any vested right of the railroad company to occupy public lands adjacent to its tracks for necessary railroad purposes. Between 1851 and 1853 it could have occupied these submerged lands "belonging to the state" under its charter grant and without any consent of the city. The subsequent expansion of the city by the statute of February 12, 1853, could not constitutionally impair a right incident to the location of 1852. The railroad company's tracks were brought

within the city limits by the subsequent acts of the state and city, but with all the rights then appertaining to the existing location,[1] and these rights included the right to occupy public lands when found necessary for the due operation of the railroad.

In support of the contention that the charter provides for the city's consent, the defendant's brief states (p. 4) that:

> "Until the present attempt of plaintiff in error, it has always recognized the necessity of getting the city's consent for any invasion it desired to make upon such public property."

This statement is inaccurate and must have been the result of inadvertence. The record discloses no such facts. The contrary is notorious. It is surprising that the city should make any such suggestion after the years of litigation in the Lake Front case, in which it was insisted by the city that it had never consented in any form to the alleged encroachments of the railroad company north of Randolph street and south of Park row which were then sought to be abated.

But the above statement in the defendant's brief surely implies, if it was not meant to suggest, that the railroad company, "until the present attempt," had "always" obtained the city's consent to the construction, not only of its tracks, but of its depots, station grounds, engine houses, etc., on submerged lands. This suggestion should be a most important and persuasive admission upon the point of contemporaneous construction. As the title to the submerged lands and the right to occupy and use them could only come from the state, and as there was no other grant from the state than that contained in the charter, the city's repeated consents "until the present attempt" to such occupation and use must fairly be

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[1] *Peo. ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528, 532.

construed as an admission that the charter gave this right, and that the city has always heretofore consented to the exercise of the charter grant. As that consent is now arbitrarily refused and withdrawn (record p. 22), and as the city stands in the way of a terminal facility absolutely and indisputably necessary for the accommodation of the public, the question is sharply presented whether or not its consent is indispensable. We venture to characterize the present refusal to consent as arbitrary because the facts showing the absolute necessity for this engine house and the peculiar appropriateness and convenience of the place selected are undisputed (see discussion in original brief, pp. 16–18).

The relevant provisions of the charter may be again quoted for convenience of reference (see appendix to principal brief). Section 3 contains the grant of public lands and waters in the following language:

> "SEC. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land, not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the state, are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporations,' approved November fifth, one thousand eight hundred and forty-nine, and the final decision or award shall vest in the corporation hereby created all the rights, franchises and immunities in said act contemplated and provided."

In an entirely different and separate part of the statute, section 8, it is provided, among other things, that:

> "Nothing in this act contained shall authorize said corporation *to make a location of their track* within any city without the consent of the common council of said city."

The contention of the city upon this last-quoted language may be best stated in the language of its own brief, as follows:

> "This must be held to mean location of track *or other structures, depots, engine houses or otherwise*, over the streets, or any part of the lands contiguous to this city, under Lake Michigan, or any other public property over which the police powers of the city extend. . . . The road is forbidden to take any land, stream, etc., for its use 'within any city' without the city's consent. (Sec. 8, Charter.)." (Defendant's brief, pp. 4, 13.)

This interpolation of the words "or other structures, depots, engine houses or otherwise" is then sought to be sustained as the intention of the legislature, first, by stating facts not shown by the record, and, secondly, by asserting that the point was decided by the Supreme Court of Illinois in 1853. Thus, it is asserted in the defendant's brief, at pages 4 and 12, that:

> "In the case of *Illinois Central Railroad Co.* v. *Rucker*, 14 Ill., 353, the Supreme Court decides in favor of plaintiff in error expressly upon the ground that it had obtained the consent of the city council before locating its depot. . . . So the case relied on by plaintiff in error as an early construction of its charter holds that under such charter the city must assent to the taking of any public property within its jurisdiction" (p. 4); and "the Rucker case, *supra*, distinctly bases the right of plaintiff in error to build its depot in the lake at Randolph street, because it had obtained a city ordinance to that effect" (p. 12).

An examination of the record and report in the *Rucker* case will show that these statements are inaccurate. The language of the court (14 Ill., at p. 359) "that the relator has the right by its charter to locate the road over the

premises in question—the city of Chicago having assented," does not mean that the city's consent to either the location or the construction of a *depot* was necessary, but merely that, as required by section 8 of the charter, the city's consent to the location of the tracks over submerged lands had been duly obtained. The contention of the adversaries of the railroad company in that case was (p. 354) "that said corporation had no power to locate their said road in the waters of Lake Michigan," and that was the fundamental question presented for adjudication. If the railroad company had no right to locate its tracks on the submerged lands of the lake belonging to the state, the location would have been unauthorized notwithstanding the city's consent, and the right to condemn adjacent private property on the upland for "depots, station grounds, engine houses," etc., would have been denied. The court held that such location of the tracks on the submerged lands of the lake belonging to the state was authorized by the *charter*, and that the assent of the city to such location within the city had been duly obtained. The location of the depot, or the city's consent thereto, was not even mentioned in the report of the case.

It must be clear from the above statement that the *Rucker* case did not decide that the city's consent was necessary before a depot could be located or built, or before land could be either reclaimed or condemned for "depots, station grounds, engine houses," etc. There is really no color for the defendant's statement, except that the ordinance of 1852 allowed the railroad company "to build its depot *in the lake* at Randolph street" in connection with the consent to the location of the *tracks* within the city limits. A perusal of the ordinance of 1852, printed in full in the appendix to this brief, will show, as the city candidly concedes (defendant's brief, p. 5), that "the council then granted the right only on

hard conditions." Those conditions compelled not only the immense expense of filling in submerged lands for track, etc., but likewise the construction and maintenance for all time of a costly sea wall or breakwater to the southern limits of the city. The imposition of these conditions in the ordinance of 1852 in no sense supports the view that the statute required anything more than consent to the location of tracks. The fact that in 1852 the city imposed conditions upon granting its consent to the location of the tracks and the use of submerged lands in which it had the riparian interest and, as this court has since held, the title in fee, furnishes no support for reading into section 8, and even less for reading into section 3, of the railroad company's charter of 1851, a provision that the city's consent was requisite to the building of any depots or engine houses upon land belonging to the state and which the state had a year previously granted for a great public purpose. In truth, the requirement as to the city's consent went no further than, if indeed it went so far as, Mr. Justice Field pointed out in the Lake Front case (*Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 445):

> "The prohibition upon the company to make a location of its road within any city, without the consent of its common council, necessarily empowered that body to prescribe the conditions of the entry so far at least as to designate the place where it should be made, the character of the tracks to be laid, and the protection and guards that should be constructed to insure their safety."

The defendant's brief likewise refers to the ordinance of 1855 and makes the statement that this ordinance was obtained by the railroad company in order to enable it to acquire "more ground for a depot," etc., and "in order to reclaim additional submerged lands" (defendant's brief, p. 38). If, however, we refer to the ordinance of 1855, which

is printed in full in the appendix to this brief, the court will observe that it was passed because it had become necessary to curve the railroad *tracks* "westwardly of the line for its track fixed by the ordinance of June 14th, 1852," and for no other purpose. The permission or consent of the city was primarily to the curving or, in other words, to the re-locating of the tracks, and had no relation whatever to the acquisition of additional ground by the railroad company under its charter for a depot or otherwise, although, as before, regulations were imposed by the common council as conditions to its consent, and these conditions were again modified in the ordinance of 1856, which is also printed in the appendix to this brief. Moreover, so far as these ordinances of 1852, 1855 and 1856 constitute consents on the part of the city to fill in or reclaim submerged lands, they relate solely to lands in which the city had riparian rights irrespective of and prior to the railroad company's charter (*infra*, pp. 15–17). But it is altogether incorrect to say that these ordinances show that the railroad company sought from the city anything more than its consent to the location or the curving, *i. e.*, the relocation of the tracks. Certainly they do not show that the railroad company sought the city's consent to the filling in of the submerged lands belonging to the state and situated south of Park row, or anywhere else where the railroad company owned in fee down to the shore of Lake Michigan.

The ordinary and fair import of the language used in section 8 of the charter of the railroad company is to require the consent of the city council to the location of the general line or route of the tracks of the railroad upon entry into any city. Section 2 of the charter clearly shows that the legislature had in mind a nar-

row use of the words "locate" and "location." Thus, the power granted is to "survey, *locate*, construct, complete, alter, maintain and operate a railroad, with one or more tracks." There is no reason why the court should interpolate in section 3 any such addition as is now suggested in order to make the statute read that the city's consent should be necessary not only before the railroad company could "make a location of their track" but before it could "construct, complete, alter, maintain and operate" its road, or before it could locate or occupy land for necessary terminals or railroad "strucures, depots, engine houses or otherwise." The city's contention would equally preclude the acquisition or occupation of private land for terminals unless the city consented, a burden imposed upon no other railroad. It would draw all the powers granted, such as constructing, completing, altering and maintaining, within the city's jurisdiction to regulate by granting or withholding its consent. The legislature saw fit to limit the city's power to the "location" of tracks, and it is not within the province of the courts to extend it. *Expressio unius est exclusio alterius.* The wording could easily have been changed to express definitely the intention that the consent of each city along the route should be requisite to the "location of their track and terminal buildings"; but the language chosen by the legislature, undoubtedly with care and deliberation, was simply "location of their track," and this too was in a statute which distinguishes between "locating" and constructing, completing, altering and maintaining, and distinguishes also between tracks and "engine houses, shops and other buildings" necessary for a railroad.

It is not contended on behalf of the city that the title to the submerged lands at Twenty-seventh street now in

question or the power to dispose of these lands has ever been in any degree vested in it, for it has always contended that such title is in the state; and these lands, as is well settled in Illinois, can only be acquired through a grant from the legislature. The railroad company owns the upland. The city never had, and cannot now pretend to have, power to grant an inch of these submerged lands for any purpose, and its consent to an encroachment upon the lake for railroad or any other purposes would be valueless. *The city's contention really amounts to this, that although there was a grant of the public lands, "submerged or otherwise,"*[1] *as set forth in section 3 of the Illinois Central's charter, it was the intention of the legislature of Illinois to make entry under such grant dependent, so far as any lands or waters within any city were concerned, upon the condition of obtaining the consent of the common council of such city.* This would concede that there was a grant, leaving open only the question whether the legislature intended to create any such condition. No such condition or proviso is stated in the act of 1851. If the legislature had intended this condition, it would obviously have so stated in section 3 when it made the grant of the lands and waters belonging to the state, or in section 8 when it provided for the consent of any city to making "a location of their track within any city." Unless we are prepared to interpolate a limitation upon the grant which the legislature did not see fit to enact or provide, the present contention of the city must be overruled, and the existence of the grant recognized.

The reason why the city consented, in the several ordinances, to the filling in of the lake front between Randolph street and Park row was not that the char-

[1] See act of 1869.

ter of the Illinois Central so required, but that the riparian rights in respect of these particular submerged lands were then in the city. As to so much submerged land as fronted on the lake between these two streets, the city's consent as riparian owner was deemed necessary; and consequently the ordinances of 1852, 1855 and 1856 in this respect constituted a grant of a right of way or easement by the city, and were in no sense a consent to the appropriation of submerged land "belonging to the state." No such feature of city ownership of the upland existed as to the submerged lands south of Park row or as to those outside of the city limits. These submerged lands belonged to the state, and the city gave no consent to their filling in, for it did not own any of the upland. There can be no doubt about the accuracy of this statement if we refer to the ordinances and to the record and decision in the Lake Front case. Thus Mr. Justice Harlan said in the circuit court (33 Fed. Rep., at p. 758):

> "So that, when the Lake Front act of 1869 was passed, the fee was in the city of Chicago, subject to the public uses indicated, of all the then open ground south of the middle line of Madison street, and north of Park row, and east of the west line of Michigan avenue. And so, also, is the fee in the city of the made or reclaimed ground between Randolph street and Park row, including the ground upon which rest the tracks and breakwater constructed by the railroad company south of Randolph street."

And Mr. Justice Field said in this court (146 U. S. at p. 462):

> "We agree with the court below that the fee of the made or reclaimed ground between Randolph street and Park Row, embracing the ground upon which rest the tracks and the breakwater of the railroad company south of Randolph street, was in the city. The fact that the land which the city had a right to fill in and appropriate by virtue of its ownership of the grounds in front of the lake had been filled in by the railroad company in the construction of the tracks for its railroad and for the

breakwater on the shore west of it, did not deprive the city of its riparian rights. The exercise of those rights was only subject to the condition of the agreement with the city, under which the tracks and breakwater were constructed by the railroad company, and that was for a perpetual right of way over the ground for its tracks of railway, and, necessarily, the continuance of the breakwater as a protection of its works and the shore from the violence of the lake. With this reservation of the right of the railroad company to its use of the tracks on ground reclaimed by it and the continuance of the breakwater, the city possesses the same right of riparian ownership, and is at full liberty to exercise it, which it ever did."

The consent of the city in 1852 to the reclamation by the railroad company of that particular strip was probably deemed essential, inasmuch as the right of reclamation belonged to the city as riparian proprietor; and the *fee* of the lands covered by the railroad tracks and structures is now in the city subject to the perpetual right of user of the railroad company. The city, in the ordinances of 1852, 1855 and 1856, was consenting to the use of property which it undoubtedly claimed the pre-emptive right to fill in and reclaim. It will be noticed that it did not, in any of these ordinances, seek to grant, or regulate the use of, submerged lands south of Park row, except so far as it required that the railroad company should build its tracks over such submerged lands and should fill in and maintain a breakwater to protect the city from the encroachments of the lake. There was no consent under the railroad charter in the true sense of the word to the erection of a breakwater by the railroad company: that was purely a condition or obligation imposed by the city upon the railroad company in consideration of the grant to that company of the privilege of entering the city over lands under water. So, as Mr. Justice Harlan said (33 Fed Rep. at p. 759):

"The city was expressly given power, by its charter, to erect

a breakwater or barrier for protection against encroachment by the waters of the lake. If it had itself erected a breakwater, south of Randolph street, in front of fractional sections 10 and 15, on the precise line adopted by the railroad company under the ordinance of 1852, and filled in the space between the breakwater and the shore-line, it could not be doubted that it would have become the owner of all the ground thus reclaimed and occupied. But, instead of doing that work itself, the city employed the railroad company to do it, in consideration of the grant to that company of the privilege of entering the city, and of laying its tracks in front of Lake Park grounds, and of the open grounds south of Randolph street."

III.

As to the continuing power of the railroad company to condemn private property or to occupy vacant land belonging to the state for necessary railroad purposes.

The discussion in the original brief on the subject and effect of the contemporaneous interpretation when the tracks were located in 1852 is very much emphasized by the fact now asserted by the city that, in making this location, it acted as the agent of the state (defendant's brief, pp. 23, 25, 27). This location by the agent of the state in the ordinance of June 14, 1852, was immediately approved and adopted by the legislature itself in the act of June 22, 1852.[1] This act amended the charter of the Illinois Central and referred to the railroad company's track "as now located at or near Twelfth street in the city of Chicago" (see act of 1852, printed in the appendix to this brief). As there could be no location of tracks within the city without the consent of the common council, and as this act was passed eight days after the ordinance of 1852, it cannot be doubted that the legislature had the ordinance before it and knew that the city, as its agent, had located the tracks over the submerged lands of Lake Michigan, and that this

[1] See discussion in original brief as to the effect of legislative recognition, pp. 30–38.

location necessarily required the taking by the railroad of submerged lands belonging to the state within and without the then city limits. Indeed, so far as appears, the state owned no lands in or about the city of Chicago adjacent to the tracks of the Illinois Central in 1851 or subsequently, except the submerged lands; and, when the act of 1852 expressly recognized the due location of the tracks at Twelfth street, the legislature knew that there were no lands belonging to the state adjacent to such location except submerged lands. In view of this legislation, supplemented by the acts of 1861, 1863 and of 1869, which latter act mentions "the *right* of the Illinois Central Railroad Company, *under the grant from the State in its charter*, . . in and to the lands *submerged or otherwise*," etc., it is clear that the right now claimed does exist as fully as it existed and was exercised from 1852 to 1869.

In construing this charter, we must, of course, not only give reasonable effect to the declaration of the legislature in section 27 that it shall be "favorably construed for all purposes therein expressed" (which was inserted for the very object of preventing a strict construction), but also recognize that this railroad was a great public instrumentality intended for all time to promote and meet the development of the commerce of the Northwest and particularly the State of Illinois and its principal city, Chicago; that the company performs a necessary and useful function of the state; that the charter was granted at a time when the state was bankrupt and when, as the city candidly confesses (defendant's brief, p. 4), "the one idea of the community was to get a railroad at any cost;" and that the road was part of a permanent national system contemplated by the Act of Congress of

September 20, 1850, to facilitate which immensely valuable grants were made to the state of Illinois. If a strict interpretation is to be applied, the provision of section 27, on which the promoters of the road relied and acted, meant nothing, and was a snare. The general doctrine as to the strict construction of charters would thus be allowed to override the particular legislative intent expressly declaring that the strict rule of interpretation should not apply to this charter, which created a great public corporation and instrumentality in perpetuity, and reserved to the state a large share of the company's *gross* earnings, regardless of there being any net earnings whatever. The fact is known to all that the Illinois Central Railroad Company pays to the state of Illinois proportionately a greater tax than any other railroad in the United States. Thus the railroad company in 1897, as appears in the record (p. 12), paid the state under its charter $625,593.30. If that be capitalized on a four per cent. basis, we should have as the present value of the state's interest in the gross earnings of the railroad company at least $15,639,835. The grant was valuable, but the consideration was ample. Who could have foreseen that this provision of the charter which, in 1855, only returned to the state $29,000, would in time result in an income of more than $625,000 per annum?

The vital fact should never be lost sight of that the railroad company was compelled by the city in 1852 to locate on this lake front and over submerged lands. It was not its choice, but a hard and at the time almost ruinous condition. So situated, it absolutely needs an engine house at this spot. Is it not reasonable to permit it to occupy adjacent and vacant public lands to promote such a public necessity? There can be no sound doctrine of law or

public policy which should prevent a railroad company from increasing its terminal facilities by taking unappropriated and vacant submerged lands of the state to the extent that the requirements and necessities of the public may reasonably require, in preference to the condemnation of private property, particularly when the route was prescribed by statute and was actually located on the lake front by the city acting as "the agent of the state," and when such location when made was a "hard condition." Mr. Justice Shiras said in the Lake Front case, 146 U. S. 387, 467 (dissenting opinion):

> "It is matter of common knowledge that a great railroad system, like that of the Illinois Central Railroad Company, requires an extensive and constantly increasing territory for its terminal facilities."

In *Philadelphia, Wilmington and Baltimore Railroad Co.* v. *Williams*, 54 Pa. St. 103, 107, Agnew, J., said:

> "The expression 'as soon as they can conveniently locate and construct' is not a limitation upon the power to compel the company to exercise its whole authority in the very beginning, when the demands of business are few. It would be an unreasonable construction of its charter to require provision to be made for all the unknown wants of the future. The increase in trade and business, and the changes taking place, often require new and increased facilities."

Now, as we have seen in the original brief, the power of railroads in Illinois to acquire new lands by condemnation is a continuing power and may be exercised from time to time as increased facilities become necessary to meet the growth and development of the cities, towns and villages along the line. *The Chicago, Burlington and Quincy Railroad Co.* v. *Isaac G. Wilson*, 17 Ill. 123, 127; *Fisher* v. *C. & S. R. R. Co.*, 104 Ill. 323, 326; *C. & W. I. R. R. Co.* v. *I. C. R. R. Co.*, 113 Ill. 156, 162. The same is true as to the continuing power to purchase

lands or acquire them by gift. Were this not the universal rule, the progress and development of our great railroad systems would be paralyzed. If, in the case at bar, the railroad company were seeking to acquire private property under eminent domain, its continuing power to condemn could not be challenged, provided it showed a reasonable necessity for the acquisition of the property. The argument of the defendant must, therefore, be narrowed to the point that, although the power to condemn and take private property is a continuing power whenever a public necessity exists, the grant of power to appropriate, for the essentially public purpose of a railroad, vacant and unused land belonging to the state is exhausted or spent by the first location of the route, and that this original location should have been made broad enough to provide for all possible "unknown wants of the future." Yet, there is no sound distinction between private and public lands in respect of continuing power if measured by the continuing and ever-growing public necessity and demand.

If the charter of 1851 really granted to the railroad company any lands, waters, etc., adjacent to the tracks and then belonging to the state, why should not the right to use such lands be exercised from time to time whenever, but not before, it becomes *necessary* so to do, subject to the limitation or contingency that the lands may in the meantime be disposed of by the state or devoted to other public uses; and, if submerged lands are occupied, then provided also that practical navigability or the public convenience of access and egress be not interfered with? Is it not the true and only sound rule that the railroad company could not have taken in 1851 either private or public lands which were then unnecessary for railroad purposes upon the

theory that the growth of its business might possibly in the distant future—here forty-five years—require additional terminal facilities, and that it could not have done so at any time unless a necessity then actually existed?

The contention of the railroad company should not be misrepresented or exaggerated. It does not claim an unrestricted right to appropriate property belonging to the state, any more than it asserts the right to condemn private property indiscriminately and without showing both a public necessity for increased facilities and the propriety and convenience of the locality selected. It makes no extravagant claim of right in respect of submerged lands of the state. But it does contend that, in view of the location of its tracks in 1852, and whenever there is a reasonable necessity for increased terminal facilities in order to accommodate the public business and to facilitate the "completing, altering, maintaining, preserving and complete operation of said road," it may occupy and hold submerged lands belonging to the state which are situated adjacent to its line of tracks as located by the charter and ordinance, and which are not needed for any other public or private purpose, and when the land in question is more conveniently and safely situated for railroad uses than any private property in the neighborhood, and its occupancy will not interfere with navigability.

Moreover, the grant by the legislature in the charter of 1851 was not for the private use or convenience of the Illinois Central Company, as the city seems to consider, but solely to promote a great public purpose and vital necessity and to be used by the railroad company as an instrumentality of the state. Railroads are created primarily to perform public functions, and not for the profit of stockholders. The charter in this case con-

ferred valuable rights and franchises, but it likewise imposed duties, obligations and burdens. The railroad company was not only permitted but obligated to "locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks, or lines of rails," etc., into the city of Chicago on Lake Michigan; and section 5 of the ordinance of 1852 expressly provides that "the said tracks shall be so constructed, furnished and operated as to meet the demands of business upon the streets and lines through and along which they shall run." The measure of the legal duty of the railroad should be the extent of its power. Its right to take public or private property must rest at all times solely upon the public necessity, and should be just as broad as that necessity, and no broader. The right to occupy submerged lands or to condemn private property could not have been exercised in 1852 in any particular case, unless a necessity born of the public demand then existed for the use of such property. The railroad company in 1852 could not have taken or condemned property then not needed simply in order to anticipate the marvelous growth of Chicago, which, indeed, no one foresaw. If a roundhouse to accommodate the traffic of the railroad has now become necessary, and if the locality selected is proper and convenient—and in the case at bar both are admitted—then it will be difficult to perceive any sound reason why the railroad company should not exercise in 1897 the power to occupy public lands as freely as it could, and was bound to, exercise it in 1852, or why any court should hold that the original location of track spent or exhausted the company's grant of power.

One of the city's suggestions would seem to be that, although the power to select parcels was validly granted to be

exercised in 1852, it was exhausted by the original location, or, in other words, "unless, indeed, such submerged lands were filled at once under that act" (of 1851).[1] This practically admits that the right to occupy submerged lands existed under the charter provided it was exercised "at once;" so that the railroad company could have filled in and built this engine house in 1852, but it cannot do so now, however great the present public necessity may be.

As the defendant puts it:

> "As we have said, the power of the plaintiff in error under its charter at the first location of its road is not in question" (defendant's brief, p. 46).

Of course, had it located and built the engine house in 1852 at this place, no consent of the city would have been necessary in any view, for the city did not extend beyond Twenty-second street.

Let us suppose that the railroad company were now to decline to furnish adequate facilities for the accommodation of the public—facilities which must be forty-fold what were needed or could reasonably have been anticipated in 1852. Would it not be preposterous for it to argue that it was only bound or permitted under its charter to furnish such facilities as were necessary in 1851 or 1852; that that was the limit and measure of its power and duty, and that the first location in 1852 exhausted its power to acquire lands? Any court would, of course, hold that the railroad company must augment its facilities with the increase of the demands of the public. If the Illinois Central's legal duty to the public obliges it to increase its terminal facilities, is it not within familiar rules vested with the power reasonably necessary to that end? It is

[1] Defendant's brief, p. 45.

compelled, by the development of the commerce at Chicago, to build an engine house. The public necessity for an engine house *somewhere adjacent* to its tracks as located by the city itself is not disputed (original brief, pp. 16–18). The railroad company finds that the most accessible and convenient place, and it may fairly be said the only practicable and safe place—having reasonable regard to the necessities and dangers of the railroad business—is this small parcel of submerged land which is adjacent to its tracks and to property which it owns in fee, which has been wholly enclosed by a breakwater or sea-wall since 1882, and which cannot be used for navigation or any other convenient public use. The propriety of the selection of this spot, its convenience to the public, the fact that it affords the safest place in view of the immense daily suburban traffic of the road, are not challenged. The issue is not as to the public necessity, but merely as to the technical power to occupy this vacant land. The propriety of the exercise of the power, if it exists, is not questioned. As the defendant candidly says:

> "A great part of the plaintiff's argument is directed to the point that the parcel of submerged land attempted to be seized is small and that no private or public rights are endangered or prejudiced thereby. But the size of the tract in question is not material. The principle involved is as wide as Lake Michigan and as deep as its deepest point. . . The argument of the public authorities is not based on the possibility of abuse; it is based on the total want of power in plaintiff to do what it has attempted, on the deliberate endeavor by plaintiff to seize public trust lands without a shadow of right or authority. . . The question as to whether plaintiff might abuse the privilege claimed by it or whether public or private convenience is more or less affected by this particular location of this round-house, or whether the four acres attempted to be seized is more or less valuable than other portions of the lake shore, is not in issue—the question is one simply of power" (defendant's brief, pp. 5, 40).

If the land belonged to a private individual, it could be condemned. It is, however, submerged land, and belongs to the state. It is clear that the state could make a grant of this portion of submerged land to be filled in for railroad purposes because, first, it would be devoting the land to a public use, and, secondly, the filling in would not interfere with navigation in any degree. . The power to grant exists in the legislature, and nowhere else, and its exercise in this instance would be justified by every consideration of public convenience and welfare. A statute now passed granting to the railroad company, in the language of the act of 1851, the right to occupy all lands and waters "belonging to the state" at Chicago which are "*necessary* for the construction, completing, altering, maintaining, preserving and complete operation of said road," would clearly cover the present case in view of the actual location of the road. It cannot be possible that a different rule applies because the charter was passed in 1851. For nearly half a century we have done what we are now attempting to do and never before in an instance where the public necessity was more pressing and evident. Certainly there should not be a different rule in this case than in 1852 and many years afterwards, especially where no police regulation is called for in respect of the public health, convenience or safety, and where the state, under whose grant we claim and in whom the title is, has never questioned the right to build the breakwater of 1882, and is not now challenging the right of this public corporation to fill in this tract for a necessary public purpose.

There would, of course, be a very important question of impairment of contract if the legislature should now attempt to wholly revoke the power it had given to this company to take public lands and waters for railroad pur-

poses, and it appeared that this unreasonably prevented the due operation of the railroad. The probability of the extension of the business and terminals from time to time undoubtedly had a potent influence upon persons contemplating the purchase of the stock and securities of the railroad company, and that right may well be said to have become vested, so long as vacant public lands adjacent to the tracks were conveniently and reasonably available. The location must be deemed to have been with relation to this probable increase of terminal requirements and the availability of the submerged lands belonging to the state.

The possibility of extravagant claims of power exists in the case of every company possessing the right to condemn, but there is ample power in the courts to restrain unnecessary appropriation of public lands as well as unnecessary condemnation of private property. If such a grant as that in the case at bar is to be stricken down because imagination may picture an attempt to occupy the whole city, and in time the whole lake, then the wise and broad-spirited doctrine of continuing power must be overturned, and the development of necessary railroad terminals must wait upon the pleasure of local authorities and legislatures. Of course, it is possible that any railroad might, under the general power customarily conferred, attempt to extend its station grounds, engine houses, machine shops, etc., to such an extent as to appropriate the greater part or the most valuable portion of any large city, but this chimera has never prevented the courts from recognizing the practical necessity of conferring upon railroads a general continuing power to be exercised reasonably and within the limits of public necessity; and this is a wise public policy in view of the full

jurisdiction which the courts have to prevent abuse or arbitrary action. As Mr. Justice Shiras said in *Bal. & Potomac R. R. Co.* v. *Fifth Bap. Church*, 108 U. S. 317, 331:

> "In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. . . . Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property."

If, in the case at bar, it appeared that the location selected on the lake front caused inconvenience or injury to the public or unreasonably interfered with the rights of owners of private property, the railroad could be prevented from constructing the roundhouse. It would be said, as the Court of Appeals of New York said in the case of *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10, 25:

> "But it must secure such a location as will enable it to conduct its operations without violating the just rights of others. Public policy indeed requires that in adjusting the mutual relations between railroad companies and individuals, courts should not stand upon the assertion of extreme rights on either side."

It may be said that the facts alleged in the case at bar leave no room for doubt that the place selected for the engine house at Twenty-seventh street will cause the least inconvenience to public and private interests, and that at the same time it will enable the railroad company to operate its road with the highest degree of promptness, efficiency and safety—a matter of vital interest to the whole public.

The defendant advances some additional propositions in support of the judgment below which should be noticed—namely, (1) that although small specific parcels of submerged lands under the waters of Lake Michigan, such as the tract in question, might be granted by the legislature, "no general grant can be made, to be utilized in the discretion of the grantee" (defendant's brief, p. 6); (2) that "the abdication to a railroad company of the election to choose such part of submerged lands as it desires for its private use is leaving such submerged lands under the 'use and control' of the company, as much as a specific grant" (p. 21); (3) that, "if plaintiff in error is right now, it might well have 'elected' to build its round-house in front of the Auditorium, and according to its own statement can now fill out and build engine houses and machine shops anywhere from 16th street to 51st street" (p. 21); (4) that "the discretion to 'elect' what parcels shall be taken is of the very essence of governmental power," which cannot be delegated (p. 24); (5) that "even if the authority to select parcels were validly granted to be exercised in 1852, it could not be exercised now, and if such grant was intended by that legislature, it would be invalid and void" (p. 25); and (6) that "the only possible way in which the legislature could grant these submerged lands would be by expressly reciting in the charter 'lands under Lake Michigan,' and of course, as we have seen, the grant could then be only of small parcels specifically described" (p. 32).

It will be observed that these propositions strike at the roots of the grant contained in the Illinois Central charter, and that, if sound, the conclusion would necessarily follow that the original appropriation of submerged lands was unauthorized, and that the railroad company had no

power whatever under its charter to take any "lands . . . belonging to the state," even in 1852, because no specific lands were described and granted. It will also be observed that the city speaks of *lands* under Lake Michigan; so that the omission of a specific description of submerged lands is all that the argument now hangs on.

The idea that the Illinois Central claims that it was given power to select arbitrarily any submerged lands belonging to the state is utterly erroneous. Its contention is that it is entitled to occupy any vacant lands belonging to the state adjacent to its tracks as located by the statute and ordinance only when and as found to be "*necessary*" for the "construction, completing, altering, maintaining, preserving and complete operation of said road," as provided in section 3 of the charter, if such appropriation of public lands does not interfere with navigation or any other public use or convenience. This is very different from asserting a power to appropriate public property indiscriminately at its will, and "for its private use." The portentous suggestion that the roundhouse could be erected in front of the Auditorium Hotel is disposed of by reference to section 9 of the ordinance of 1852, which expressly imposes the condition that no buildings shall be erected "between the north line of Randolph street and the south line of the said Lake park."

IV.

As to the Lake Front judgment (33 Fed. Rep. 730, and 146 U. S. 387), and in whose favor it operates as res adjudicata.

The city of Chicago contends that the controversy on the merits was definitely settled in the Lake Front case (*Illinois Central Railroad* v. *Illinois*, 33 Fed. Rep. 730, and 146 U. S. 387), and that the question of the power of

the Illinois Central to occupy and fill in submerged lands belonging to the state "is no longer open, because plaintiff's rights are identical at 27th and 16th streets" (defendant's brief, pp. 18, 44). As, in this aspect of the case, the identity of rights is conceded and insisted upon by the Illinois Central Company, it remains to consider what was actually decided in the Lake Front case, and in whose favor the judgment operates, with the effect of the thing adjudged.

In the Lake Front case, the right of the railroad company to fill in submerged lands for the location of depots, station grounds, turn-outs, engine houses, buildings, etc., necessary to the complete operation of its road, was distinctly involved. The proofs pointed out the old shore line of 1852, the line of filling in prescribed by the ordinance of 1852, the line of filling in by the railroad company as it was in 1869 at the time of the passage of the confirmatory act, the line of submerged lands which had since been filled in by the railroad company, with the buildings, including particularly roundhouses, erected thereon, and the piers or docks which had been built into the lake. These lines were shown upon the so-called "Morehouse map," which was expressly made a part of the final decree and is printed in 146 U. S., at p. 413. A *fac-simile* of the map as contained in the Lake Front record is annexed to this brief. In considering the decision, it is necessary to bear in mind the difference between the submerged lands fronting between Randolph street and Park row, in which in 1851 the city seems to have had the riparian rights, and the submerged lands south of Park row, and likewise the difference between the question as to the filling in to the bulkhead lines for railroad purposes and the question as to the con-

struction of piers and docks out into the lake for general commercial purposes. The decree of the circuit court confirmed the right of the railroad company to the submerged lands which had been filled in for railroad purposes as well before as after the act of 1869, whether north or south of Park row. The circuit court, as shown by the final decree printed in the Lake Front record at page 220, expressly decided in favor of the railroad company in respect of the submerged lands on the lake shore fronting on the space between Park row and Sixteenth street which were filled in partly before and partly after the act of 1869; and this decree was *affirmed* by this court except with the following modification, relating wholly to the pier and dock shown on the Morehouse map to have been built in 1885. The opinion and mandate of the court as to this modification will be found at the close of Mr. Justice Field's opinion (146 U. S. at p. 464), viz.:

> "And also to order that similar proceedings be taken to ascertain and determine whether or not the pier and dock, constructed by the railroad company in front of the shore between Twelfth and Sixteenth streets extend beyond the point of navigability, and to affirm the title and possession of the company if they do not extend beyond such point, and, if they do extend beyond such point, to order the abatement and removal of the excess, or that other proceedings relating thereto be taken on application of the State as may be authorized by law."

In the Lake Front case, the state did not contend that the charter contained no grant to the railroad company of submerged lands, nor did the city so contend. On the contrary, the state in its formal pleading filed in that case practically conceded that there was a grant of submerged lands in the charter, but urged that it had been exhausted by the original location. Thus, in the amended information filed June 21, 1887, after the litigation had been pending for several years, the state set forth explicitly what it did

claim, and alleged (record Lake Front case, pp. 121, 140, 141) as follows:

> "That it [the Illinois Central Railroad Company] also asserts that by its charter of 1851 it was empowered to use all the land and domain of the State which it might ever after need and desire for railroad purposes, while the truth and fact is that it has long ago made the location of its road and, as your informant believes, has caused the same to be recorded in the proper offices as the law requires, and *its power to use the public domain* has been long exhausted."

The decision was in the railroad company's favor so far as the point now involved was concerned. The only part of the litigation which went against the railroad company was, first, as to its title to the submerged lands of the outer harbor under the grant in the act of 1869, which it was held had been duly revoked by the act of 1873, and, secondly, as to its right to build piers or docks into the lake, which was limited to the point of practical navigability; and on this latter point the subsequent inquiry has resulted in favor of the railroad company (91 Fed. Rep. 955).

The proof in the Lake Front case showed that a roundhouse and machine shops east of lot 21 had been erected on submerged lands prior to the act of 1869. These were "the roundhouse and machine shops of said company" referred to in that act. It also appeared that, after the act of 1869, the company had filled in additional submerged land between Park row and Sixteenth street out to a new bulkhead line, and that on this newly filled in submerged land it had built a roundhouse. The question then presented was "identical" with the question now presented, namely—whether the railroad company had the right under its charter to fill in submerged land and build a roundhouse thereon—and in addition the separate question whether it had a right to

extend from this solid filling a pier or dock into the lake to the point of practical navigability. To do this filling in between Park row and Sixteenth street either before or after the act of 1869 no consent or ordinance of the city was either applied for or granted. None was ever shown or claimed to exist. In passing upon the question of the right to fill in and reclaim for railroad purposes, the circuit court used language, which, if applied to the case at bar, ought to be decisive of the issue in favor of the plaintiff in error. Thus, after reviewing the proof and referring to the Morehouse map, Mr. Justice Harlan said (33 Fed. Rep. at pp. 756, 757):

> "As to the structures erected by the company east of the exterior line designated by the ordinance of 1852, those built in 1867 may be justified—apart from the confirmatory clauses of the act of 1869—under *the power expressly given to enter upon, take possession of, and use (provided navigation was not thereby interrupted) any lands or waters of the state that were necessary for the complete operation of the road*, for the purpose designated in the charter of the company. . . . *The right of way was located in the open waters of the lake. The state consented, in the charter of the company, that the bed of the lake might be used by the company for a right of way; provided the city assented to the location of the tracks within its limits. The city gave its consent by the ordinance of 1852.* Nothing more is requisite to show that the tracks of the company were legally located on the line designated for a right of way. The use of such ground, in perpetuity, as a right of way simply, does not violate any right of the state, of the city, or of the United States. Upon the same grounds,—the power given to the company in its charter to enter upon and use any land or waters belonging to the state for a right of way of a prescribed width, and for the location of depots, and for the purpose of constructing station grounds, turn-outs, buildings, etc., necessary to the complete operation of its road, and the consent of the city, as manifested in the ordinances of 1855 and 1856,—the occupancy of the two triangular pieces of ground south of Randolph street for the purposes of right of way must be sustained as legal. It would be waste of time to set out the evidence showing that these two pieces of ground are essential to

the operation of the road. Without them, as the ordinances of 1855 and 1856 upon their face indicate, the trains of the company could not conveniently approach its passenger depot, freight-yards, and piers.

"What has been said upon this branch of the case is decisive of the question before the court in respect to the structures erected by the railroad company south of Park row and north of Sixteenth street. The company is shown to be the owner of all the water lots in front of which such structures have been made. The breakwater there constructed was, according to the evidence, necessary to protect the railroad from the waters of the lake; the old breakwater having become insufficient, under the ordinance of 1852, which, it must be remembered, required the shore to be protected by a continuous stone wall or structure of stone masonry, pier-work, or other material, outside of the track of the road, as might be 'expedient,' and as would be of the strength and magnitude requisite to protect the entire front of the city between the north line of Randolph street and its southern boundary against further damage from the action of the waters of the lake. The part of the structure to be erected south of Lake park was required by the ordinance to be commenced and prosecuted with all reasonable dispatch after the acceptance of the ordinance. While the new breakwater is further from the shore than the old one, it does not appear to materially obstruct the use of the navigable waters by the public. As to the large pier at the foot of Thirteenth street, it does not interfere with the public right of navigation. It is wider than was contemplated by the company at the time the plan therefor was submitted to the war department. But such increase of width does not seem to be a matter of any consequence. According to the evidence, none of the structures south of Park Row interfere with the public use of the waters of the lake for purposes of commerce and navigation. Their erection may fairly be referred to the riparian ownership of the company, and to its charter right to occupy and use the land and waters of the state for the purposes defined in its charter, provided, only, navigation is not interrupted; and, as their erection was not forbidden by regulations established under the authority of any statute, no ground is shown for the interference of the court."

The final decree then entered, which was affirmed by this court, except as to the 1885 wharf, provided, among other things (see Lake Front record, pp. 222, 223) as follows:

"That said company is likewise the owner in fee of all the wharves, piers, *and other works* made and constructed by it in the city of Chicago east of its main tracks between the north line of block 23, in fractional section 15 addition to Chicago, and the centre line of Sixteenth street extended, *including* the pier or line of piling represented upon the said Morehouse map to have been built in 1870, and the station grounds lying west of the said pier and contiguous thereto; also of the wharf or pier projecting into the lake from the grounds last mentioned and represented upon the said Morehouse map to have been built in 1885; which said wharves, piers, *and other works* so constructed and so far as constructed by the said Illinois Central Railroad Company as aforesaid are lawful structures and not encroachments upon the domain of the State of Illinois or upon the public right of navigation or upon the property, interests, or estate of the said city of Chicago."

Notwithstanding the above, the city contends that the effect of the Lake Front case is entirely different, viz.:

"But the court found in the 146th U. S. that plaintiff had no right, *under its charter*, to fill in between 12th and 16th streets, where, as here, it was riparian owner, and found that it had no other right than as riparian owner to wharf out, and ordered all structures, not wharves built out properly under its rights as riparian owner, to be abated and removed" (defendant's brief, p. 43).

It is submitted that this statement entirely misconceives what was really decided at circuit and in this court in the Lake Front case.

The ordinances of 1855 and 1856 (printed in the appendix), referred to by Mr. Justice Harlan, relate solely to property in front of the public ground between Madison street and Randolph street, and do not apply in any sense to the lake front between Park row and Sixteenth street, except so far as these two ordinances continued the conditions and restrictions imposed in the ordinance of 1852. The "permission" given by the ordinance of 1856 was a modification of the *conditions* originally imposed as to the "location of the track," and cannot in any just sense constitute evidence that the

railroad company sought the consent of the city as a condition of the exercise of its charter right to occupy submerged lands belonging to the state and situated south of Park row (see *supra*, pp. 15–17).

To repeat, the filling in of the submerged land in front of the property *south of Park row* was done without any ordinance or consent on the part of the city. In other words, the Illinois Central filled in the lake front between Park row and Sixteenth street under the grant in its charter, as it now claims to have the right to do in front of Twenty-seventh street. Its right to do this was affirmed in the Lake Front case. If it had no right to reclaim and use submerged land in front of Sixteenth street in 1852 and before or after 1869, it has no right to do so now in front of Twenty-seventh street. But it is submitted that, unless the Lake Front decision is to be entirely overturned and nullified, the Illinois Central has the same right to fill in at Twenty-seventh street which was adjudged to exist at Sixteenth street.

Moreover, had this small piece of submerged land, then entirely enclosed by this breakwater, been expressly called to the attention of the courts in the Lake Front case, it cannot be doubted for a moment that the circuit court and this court on appeal would have also confirmed the right of the railroad company to build the breakwater and fill in and reclaim the submerged land enclosed by it for necessary railroad purposes. In fact, the point presented in this case is simpler than the principal questions involved in the prior litigation. It is whether the railroad company may fill in the space wholly enclosed by the bulkhead of 1882, and does not, therefore, present any question as to navigable waters, for the enclosed space is not navigable. Having duly enclosed

this tract by a bulkhead or sea wall, may not the railroad company now fill in and render the space useful and available for an essentially public purpose, or to make practicable access to and egress from the water? That is the question; and the case involves no more.

But, in view of the fact that the bulkhead or breakwater entirely enclosing the tract in question was built in 1882 (record, p. 19) and existed when the Lake Front case was commenced and during the whole period of that litigation, the decision in that case should be regarded as *res adjudicata* at least as to the breakwater within the firmly fixed doctrine that "a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented." Mr. Justice Harlan in *Dowell* v. *Applegate*, 152 U. S. 327, 345. See also, *Aurora City* v. *West*, 7 Wall. 82, 96; *Baird* v. *United States*, 96 U. S. 430, 432; *Lumber Co.* v. *Buchtel*, 101 U. S. 638, 639; *Bissell* v. *Spring Valley Township*, 124 U. S. 225, 231. If it be said that the city or the state was not called upon necessarily to bring the encroachments south of Sixteenth street before the court in the Lake Front case and could have reserved each separate construction for a distinct suit, nevertheless the judgment is conclusive as an estoppel because of what was actually decided in the Lake Front case—namely, that the railroad company had the right under its charter to occupy submerged lands belonging to the state. *Last Chance Min. Co.* v. *Tyler Min. Co.*, 157 U. S. 683, 687. Appreciating the effect of these settled rules, the city in its answer "disclaims all intention or design of interfering with the repair or reconstruction of the breakwater at the point named in said bill of complaint" (record, p. 36).

The breakwater, which since 1882 has wholly enclosed the strip in question and protected the city as well as the railroad tracks from the storms of Lake Michigan, may, therefore, be deemed to have been built by authority of law. The only remaining issue is as to the right to fill in this enclosed space. The charter right of the railroad company to fill in to the breakwater or bulkhead line between Park row and Sixteenth street was under substantially similar circumstances adjudged in the Lake Front case. The right now to fill in for a necessary railroad purpose the parcel at Twenty-seventh street must depend upon the existence or non-existence of the same title, namely, the charter grant, and upon substantially the same facts, and the litigation is between the same parties. It is submitted that the force and effect of the thing adjudged is not lessened merely because a different parcel of submerged land is now involved. In *Southern Pacific Railr'd* v. *United States*, 168 U. S. 1, 54, Mr. Justice Harlan said:

> "It is also said that the decision in the former cases concluded, at most, only the question of title in respect of the lands there in controversy. This cannot be correct when the lands in both suits have a common source of title, and the title depends upon the existence or non-existence of the same fact or facts."

So in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396, Mr. Justice White said:

> "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies."

And this should be emphatically so in the case at bar in view of the insistence of the city that the point now presented as to Twenty-seventh street is "identical"

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(defendant's brief, p. 44), and that the prior decision did in fact "definitely" settle the merits (p. 18).

Washington, January 9, 1900.

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APPENDIX.

ORDINANCE OF 1852.

AN ORDINANCE CONCERNING THE ILLINOIS CENTRAL RAILROAD COMPANY.

(Adopted June 14, 1852.)

Be it ordained by the common council of the city of Chicago:

SEC. 1. That permission is hereby granted to the Illinois Central Railroad Company, to lay down, construct, and maintain within the limits of the city of Chicago, and along the margin of the lake within and adjacent to the same, a railroad, with one or more tracks, and to operate the same with locomotive engines and cars, under such rules and regulations, with reference to speed of trains, the receipt, safe keeping and delivery of freight, and arrangements for the accommodation and conveyance of passengers, not inconsistent with the public safety, as said company may from time to time establish, and to have the right of way and all powers incident to and necessary therefor, in the manner and upon the terms and conditions following, to wit: *The said road shall enter said city at or near the intersection of its southern boundary with Lake Michigan, and following the shore on or near the margin of said lake northerly to the southern bounds of the open space known as Lake park, in front of canal section fifteen, and continue northerly across the open space in front of said section fifteen to such grounds as the said company may acquire between the north line of Randolph street and the Chicago river, in the Fort Dearborn addition to said city, upon which said grounds shall be located the depot of said railroad within the city*, and such other buildings, slips, or apparatus as may be necessary and convenient for the business of said company. But it is expressly understood that the city of Chicago does not undertake to obtain for said company any right of way, or other right, privilege, or easement, not now in the power of said city to grant or confer, or to assume any liability or responsibility for the acts of said company.

SEC. 2. The said company may enter upon and use in perpetuity for its said line of road, and other works necessary to protect the same from the lake, a width of three hundred feet, from the southern boundary of said public ground near Twelfth street, to the northern line of Randolph street; the inner or west line of the ground to be used by said company to be not less than four hundred feet east from the west line of Michigan avenue, and parallel thereto.

SEC. 3. The said company may extend their works and fill out into the lake to a point in the southern pier not less than four hundred feet west

from the present east end of the same, thence parallel with Michigan avenue to the north line of Randolph street extended; but it is expressly understood that the common council does not grant any right or privilege beyond the limits above specified, nor beyond the line that may be actually occupied by the works of said company. It is further expressly understood that should any damage or obstruction occur to the harbor of Chicago, clearly traceable to the construction of said works contemplated by sections two and three hereof, then the said company shall be held responsible for the same.

SEC. 4. Permission and right of way are hereby given to the said company to construct and maintain a side track from its main track, beginning at or south of Twelfth street, proceeding through said street, or such line as may be prescribed by the common council, westerly to the South branch of the Chicago river; thence crossing the said South branch by a bridge, or other mode to be approved by the common council which shall not obstruct navigation; thence proceeding northerly to Kinzie street, following as far as practicable the streets nearest to said branch, on such sides of the centre of streets as the common council may prescribe; said track not to be laid west of the west line of Canal street; and also a track leading from the last-mentioned track at or near its intersection with the eastern line of the said South branch of the Chicago river, along the line of said South branch, into Market street, following, as far as possible, the streets nearest the river and on such sides of such streets as the common council may direct; thence along the west line of Market street northerly to Lake street; and they may also extend the track of said road from their track or grounds south of the south pier, across the Chicago river to North Water street by means of a draw-bridge, or other mode which shall not obstruct navigation, and which may be approved by the common council.

SEC. 5. And the said tracks shall be so constructed, furnished and operated as to meet the demands of business upon the streets and lines through and along which they shall run. The said side tracks, stations, depots, turn-outs, switches, turn-tables, buildings and bridges along said line, as well as the motive power to be used and the rate of speed thereon, to be subject to such regulations as the common council may from time to time prescribe for the government of side tracks of railroads within the inhabited portions of the city; said side tracks shall be open to the use of other railroad companies and railroads connecting therewith, upon just and equitable terms, to be agreed upon by the parties interested, and in case of disagreement, by arbitration.

SEC. 6. The said company shall erect and maintain on the western or inner line of the ground pointed out for its main track on the lake shore, as the same is hereinbefore defined, such suitable walls, fences or other sufficient works, as will prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger, said structure to be of suitable materials and sightly appearance, and of such heights as the

common council may direct, and no change therein shall be made except by mutual consent: Provided, however, that the company shall construct such suitable gates at proper places at the ends of the streets, which are now or may hereafter be laid out, as may be required by the common council, to afford safe access to the lake: And provided, also, that in case of the construction of an outside harbor, streets may be laid out to approach the same, in the manner provided by law, in which case the common council may regulate the speed of locomotives and trains across them.

SEC. 7. The said company shall erect and complete within three years after they shall have accepted this ordinance, and shall forever thereafter maintain, a continuous wall or structure of stone masonry, pier work or other sufficient material, of regular and sightly appearance, and not to exceed in height the general level of Michigan avenue, opposite thereto, from the north side of Randolph street to the southern bound of Lake park before mentioned, at a distance of not more than 300 feet east from and parallel with the western or inner line, pointed out for said company, as specified in section two hereof, and shall continue said works to the southern boundary of the city, at such distance outside of the track of said road as may be expedient, which structure and works shall be of sufficient strength and magnitude to protect the entire front of said city between the north line of Randolph street and its southern boundary from further damage or injury from the action of the waters of Lake Michigan, and that part of the structure south of Lake park shall be commenced and prosecuted with all reasonable dispatch, after the acceptance of this ordinance.

SEC. 8. The said company shall not in any manner, nor for any purpose whatever, occupy, use or intrude upon the open ground known as Lake park, belonging to the city of Chicago, lying between Michigan avenue and the western or inner line before mentioned, except so far as the common council may consent, for the convenience of said company, while constructing or repairing the works in front of said ground.

SEC. 9. The said company shall erect no buildings between the north line of Randolph street and the south line of the said Lake park, nor occupy nor use the works proposed to be constructed between these points, except for the passage of, or for making up or distributing their trains; nor place upon any part of their works between said points any obstruction to the view of the lake from the shore, nor suffer their locomotives, cars or other articles to remain upon their tracks, but only erect such works as are proper for the construction of their necessary tracks and protection of the same.

SEC. 10. The said company, in constructing their said line of works in front of Lake park and the public grounds, shall make and keep open, through the same, such culverts or ways as the common council shall prescribe, from the open lake to the space inside of the western line before mentioned, as will afford room for the uninterrupted flow of the water through the same.

SEC. 11. The said company shall lay down, construct, operate and maintain a track, with suitable turn-outs, switches and turn-tables through Twelfth street, or through such other street north of North street as the common council may designate, from their main track on the lake shore, to connect with the said tracks to be constructed by the Chicago & Rock Island Railroad Company, or procure the same to be done, as provided by an ordinance of the city of Chicago, passed April 2, 1852, so soon as the said track on the east side of the south branch of the river shall be completed: Provided, that the city of Chicago shall furnish the right of way to the said company, free of cost, before requiring said track to be constructed.

SEC. 12. Upon the acceptance of this ordinance by the said company (which shall be within ninety days of the passing of the same) a contract or agreement embodying the provisions herein contained, and stipulating that the permission, rights and privileges hereby conferred upon said company shall depend upon the performance on their part of the requirements made upon them by this ordinance shall be executed, sealed and delivered on the part of the city of Chicago by the mayor thereof, and on the part of the Illinois Central Railroad Company by the president thereof, both in usual legal form.

ORDINANCE OF 1855.

ORDINANCE GRANTING RIGHT OF WAY FOR APPROACH TO PASSENGER DEPOT.

(Adopted September 10, 1855.)

Whereas, it has become necessary for the Illinois Central Railroad Company, in order to approach its passenger-house, to curve its tracks westwardly of the line for its track fixed by the ordinance of June 14th, 1852, by crossing said line south of Randolph street, extended and proceeding northwesterly to its said passenger-house; and

Whereas, the said company has presented to this council a petition, accompanied by a map of its depot grounds, showing the tracks and curves as proposed to be made; therefore,

Resolved, That permission be and the same is hereby granted to said company to curve its tracks westwardly of the line fixed by said ordinance, so as to cross said line at a point not more than two hundred feet south of Randolph street, extending and curving said tracks northwesterly as they approach the depot and crossing the north line of Randolph street, extended at a point not more than one hundred feet west of the line fixed by the ordinance aforesaid, in accordance with the map or plat thereof submitted by said company and placed on file for reference.

Upon the following conditions, however:

First. That the said company shall lay out upon its own land, west of and alongside its passenger-house, a street fifty feet wide extending from Water street to Randolph street, and fill the same up its entire length within two years from the passage of this resolution.

Second. That said company shall be restricted in the use of said tracks south of the north line of Randolph street, precisely as is provided by said ordinance of June 14th, 1852, relative to the main and side tracks, and shall permit no cars to stand thereon except as is in said ordinance provided.

Third. When the said company shall fill up under its said tracks south of the north line of Randolph street down to the point where said curves and side tracks commence, and the city shall grant its permission so to fill up its tracks, it shall also fill up, at the same time and to an equal height, all the space between the track so filled up and the lake shore as it now exists, from the north side of Randolph street down to the point where said curves and side tracks intersect the line fixed by the ordinance aforesaid.

Fourth. That the said company shall file with the city clerk its acceptance of the terms of this resolution and its agreement to abide by and perform the said conditions before it shall construct said tracks.

Such acceptance to be under the corporate seal of said company and the signature of the president thereof.

ORDINANCE OF 1856.

AN ORDINANCE GRANTING ADDITIONAL RIGHT OF WAY TO THE ILLINOIS CENTRAL RAILROAD COMPANY.

(Adopted September 15, 1856.)

Whereas, the common council of this city, by an ordinance of the 14th day of June, 1852, granted to the Illinois Central Railroad Company the right to enter and use in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, a width of three hundred feet from the southern boundary of the public ground on Twelfth street to the northern line of Randolph street, the inner or the west line of which ground so to be used by the company, to be not less than four hundred feet east from the west line of Michigan avenue and parallel thereto ; and,

Whereas, the ground thus granted is shown to be too narrow to afford to said company a convenient means of approaching and using a part of their station grounds, between Randolph street and the Chicago river ; therefore,

Be it ordained by the common council of the city of Chicago :

That permission is hereby granted to the said Illinois Central Railroad Company to enter upon and use in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, the space between its present breakwater and a line drawn from a point on said breakwater, seven hundred feet south of the north line of Randolph (street), extended, and running thence on a straight line to the southeast corner of its present breakwater, and thence to the river. Provided, however, and this per-

mission is only given upon the express condition that the portion of said line which lies south of the north line of Randolph street extended, shall be kept subject to all the conditions and restrictions, as to the use of the same, as are imposed upon that part of said line by the said ordinance of June 14, 1852.

Act of 1851.

An Act to reduce the law incorporating the City of Chicago, and the several acts amendatory thereof, into one act, and to amend the same. (Approved February 14, 1851;[1] Priv. Laws Illinois 1851, pp. 132, 141, 142, 147.)

* * * * * *

Chapter IV. *Of the Common Council: Its General Powers and Duties.*

"§ 1. The mayor and aldermen shall constitute the common council of said city. * *

"§ 4. The common council shall have the management and control of the finances, and all property, real, personal and mixed, belonging to the corporation, and shall likewise have power within the jurisdiction of the city, by ordinance: * *

"*Fifty-third.* To preserve the harbor; to prevent any use of the same, or any act in relation thereto inconsistent with, or detrimental to, the public health, or calculated to render the waters of the harbor, or any part thereof, impure or offensive, or tending in any degree to fill up or obstruct the same; . . . to prevent and remove all obstructions therein, and to punish the authors thereof. . . . The harbor of the city shall include the piers and so much of lake Michigan as lies within the distance of one mile thereof into the lake, and the Chicago river and its branches to their respective sources."

Act of 1852.

An Act to amend the charter of the Illinois Central Railroad Company. (Approved June 22, 1852; Laws Illinois 1852, vol. 31, p. 130).

Section 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That the Illinois Central Railroad Company be and is hereby empowered and authorized to locate, construct and operate a lateral branch or track from its eastern branch, as now located at or near Twelfth street in the city of Chicago, to the south branch of the Chicago river, on such terms and conditions and in such manner as may be stipulated between the common council of said city of Chicago and the said company. * *

This act to take effect from and after its passage.

[1] Four days subsequent to charter of Illinois Central Railroad Company.